SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 675

VERNA MAE BIHN, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

C 119-66

UNITED STATES OF AMERICA

against

GEORGE WESLEY BENNETT, Defendant,

and

VERNA MAE BIHN, Defendant-Appellant

STATEMENT UNDER RULE 13

The defendant-appellant above named, Verna Mae Bihn, was indicted together with defendant, George Wesley Bennett, for conspiracy to violate Title 50, Appendix, Section 633, United States Code, in that they would unlawfully acquire, possess and transfer gasoline ration coupons, said defendants not being the persons or agents of the persons to whom said gasoline ration coupons were issued or by whom they were acquired. The indictment was filed in the United States District Court for the Southern District of New York, on December 8, 1944. The defendant-appellant pleaded "Not Guilty" on December 11, 1944.

On January 30, 1945, the trial was begun as to both defendants before Hon. Grover M. Moscowitz, United States District Judge. On February 1, 1945, the said trial was concluded and the jury returned a verdict of "Guilty" as to both defendants. Motion to set aside the verdict was made at the time of rendition, said motion was denied and sentence was adjourned to February 9, 1945. On said date the said defendant-appellant, Verna Mae Bihn, was sentenced to one year and one day at a place of confinement to be designated by the Attorney General of the United [fol. 2] States with recommendation that she be sent to Federal Women's Reformatory, Alderson, West Virginia.

On February 13, 1945, said defendant-appellant filed a notice and grounds of appeal.

On February 19, 1945, upon motion granted the said defendant-appellant was released on bail pending the determination of her appeal.

On the trial and on this appeal the said defendant-appellant, Verna Mae Bihn, is represented by Henry K. Chapman, Esq.

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES

vs.

VERNA MAE BIHN

and

GEORGE WESLEY BENNETT

Violation of Title 18, Section 88 U. S. C. Conspiracy to unlawful possession and transfer of gasoline ration coupons.

DOCKET ENTRIES

1944

Dec. 8—Filed Indictment.

Dec. 11—George Wesley Bennett Pleads Not Guilty }

Dec. 11—Verna Mae Bihn Pleads Not Guilty } Released on their own recognizance on this Indictment—Conger J.

Dec.19—Filed Remand—Geo. W. Bennett date 12/11/44—Conger J.

Dec. 19—Filed Remand—Geo. W. Bennett date 12/11/44—Conger J.

[fol. 3] 1945

Jan. 15—Bench Warrant Ordered for Verna Mae Bihn—Clancy J.

Jan. 16—Bench Warrant for Verna Mae Bihn ordered vacated—Clancy J.

Jan. 30—Trial begun as to both defendants before—Moscowitz J.

Jan. 31—Trial continued.

Feb. 1—Trial concluded. Verdict—Defendants guilty—Sentences adjourned to Feb. 9, 1945, at 10:30 A. M. Defendant Bihn paroled on own recognizance on this indictment. Bail of $2000. continued on indictment C 118/361. Deft. Bennett remand—Moscowitz J.

Feb. 5—Filed copy of telegram dated 2/2/45. Re: Bail bond of deft. Bihn.

Feb. 9—Filed Judgment—Verna Mae Bihn—One Year and One Day at a place of confinement to be designated by the Attorney General of the United States. Recommend defendant be sent to Federal Reformatory for women, Alderson, West Va. Deft. to surrender 2/16/45. Released on her own recognizance—Moscowitz J.

Feb. 9—Filed Judgment—George Wesley Bennett—Six months to begin after service of sentence on Indictment C119/14 at a place of confinement to be designated by the Attorney General of the United States—Moscowitz J.

Feb. 9—Issued commitment in triplicate as to both.

Feb. 13—Filed Notice of Appeal by Verna Mae Bihn (notice to Moscowitz) (N. D. C.) 5 00

[fol. 4] Feb. 19—Filed affidavit requesting bail for Verna Mae Bihn pending appeal. Memo endorsed—Bail fixed at $1000. pending appeal.

Feb. 28—Filed Commitment & entered return Defendant Geo. W. Bennett delivered to the Fed. Corr. Inst. Danbury, Conn. 2/24/25. Filed Bond pending Appeal—dated 2/19/45. Verna M. Bihn $1000. Ralph P. Bihn of Casa, Arkansas, surety.

Mar. 16—Filed stipulation extending time to file Transcript of Record & Assignment of errors to & including 4/15/45. So ordered—Coxe, J. 5

Apr. 24—Filed stipulation extending time of Verna Mae Bihn to file bill of exceptions etc. to & including 5/1/45—So ordered A. M. Bell, Clerk C. C. A. 4/16/45.

In United States District Court

Indictment

Southern District of New York, ss:

The Grand Jurors for the United States of America, duly empaneled and sworn in the District Court of the United States for the Southern District of New York, and inquiring for that District, upon their oath present:

That heretofore, to wit, from on or about the 1st day of July, 1943, and continuously thereafter up to and including the 6th day of September, 1944, at the Southern District

of New York and within the jurisdiction of this Court. [fol. 5] Verna Mae Bihn and George Wesley Bennett, the defendants herein, unlawfully, wilfully and knowingly did combine, conspire, confederate and agree together and with each other and with divers other persons to the Grand Jurors unknown to violate Title 50, Appendix, Section 633, United States Code, and the rules, regulations and orders duly adopted and issued pursuant thereto.

It was part of said conspiracy that the defendants herein would unlawfully acquire, possess and transfer gasoline ration coupons, the exact number and type being to the Grand Jurors unknown, said defendants not being the persons or agents of the persons to whom said gasoline coupons were issued or by whom they were acquired, in accordance with regulations issued by the Price Administrator.

It was further a part of said conspiracy that the aforesaid defendant, Verna Mae Bihn, would steal, purloin and embezzle gasoline ration coupons, the exact number and type being to the Grand Juors unknown, from the First National Bank of Poughkeepsie, New York.

It was further a part of said conspiracy that the aforesaid defendant, Verna Mae Bihn, would transfer gasoline ration coupons, the exact number and type being to the Grand Jurors unknown, to the defendant George Wesley Bennett and to others to the Grand Jurors unknown.

It was further a part of said conspiracy that the aforesaid defendant, George Wesley Bennett, would give, transfer and sell gasoline ration coupons, the exact number and type being to the Grand Jurors unknown, to one Joel Lewis and to others to the Grand Jurors unknown.

It was further a part of said conspiracy that the aforesaid defendants, Verna Mae Bihn and George Wesley Bennett, would share the moneys obtained from the sale of the aforesaid stolen ration coupons, the exact number and type being to the Grand Jurors unknown.

[fol. 6] Overt Acts

1. In pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 9th day of April, 1944, the defendants Verna Mae Bihn and George Wesley Bennett had a conversation.

2. In further pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about and some time during the month of October, 1943, the defendant George Wesley Bennett had a conversation with Joel Lewis.

3. In further pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about and some time during the month of November, 1943, the defendant George Wesley Bennett had a conversation with Joel Lewis.

4. In further pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about and some time during the month of January, 1944, the defendant George Wesley Bennett had a conversation with the defendant Verna Mae Bihn.

5. In further pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about and some time during the month of May, 1944, the defendant George Wesley Bennett had a conversation with Janna Howe.

[fol. 7] Against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 18, Section 88, United States Code).

John F. X. McGohey, United States Attorney.

IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION OF AGREED FACTS

It is hereby stipulated and agreed by and between the appellant, and the United States Attorney for the Southern District of New York that the following constitutes a narrative statement of facts in the case of *United States v. Verna Mae Bihn and George Wesley Bennett*. The

parties to this stipulation agree that the facts mentioned hereafter are accurate, but neither party is precluded from referring to additional facts in the record on the argument of the appeal.

Statement of Facts

Appellant Verna Mae Bihn, the defendant George Wesley Bennett, and the husband of Mrs. Bihn, lived in the same three room apartment in Poughkeepsie from some [fol. 8] time in August, 1943, until February, 1944, at which time Bennett left the Bihn household to get married (Ex. 9). Mrs. Bihn was employed during this period of time at the First National Bank of Poughkeepsie. Her duties there during the greater part of her employment which extended from late summer of 1943 until the first part of September 1944, were in the main connected with rationing and the necessary bookkeeping attached to the rationing functions which the bank undertook on behalf of the Government (79).

During the period when Bennett was living in the Bihn household, Mrs. Bihn on many occasions would bring home gasoline ration coupons. When Mrs. Bihn's husband was not present, Mrs. Bihn would give these coupons to Bennett. Bennett would take these coupons, sell them, return home and divide the money received from the sale of these coupons with Mrs. Bihn (Exs. 9, 47, 41). Sometimes Mrs. Bihn would bring home loose gasoline ration stamps and sometimes she would bring home gasoline ration stamps already affixed to gummed O. P. A. forms called O. P. A. Forms R 120 (known in the gasoline trade as "bingo" sheets): Mrs. Bihn brought these stamps home to Bennett on approximately ten occasions. The average amount of coupons which she brought home was between 300 and 500 gallons each time. The largest amount of coupons that Mrs. Bihn ever brought to Bennett was between 500 and 600 gallons. When these coupons were affixed to "bingo" sheets, Mrs. Bihn would soak these coupons in water and give them to Bennett to sell after they had been removed from the gummed "bingo" sheets on which they had been affixed (Ex. 9).

When Bennett moved to his new home in February, there were resident in this new home, in addition to his wife, the witnesses Sussana Howe and Janna Howe, respectively,

the mother-in-law and sister-in-law of the defendant Bennett (3, 61).

[fol. 9] One Sunday in May of 1944, Mrs. Bihn approached the home of the Bennetts and remained outside (5). Mrs. Howe asked her to leave. There ensued an altercation during which the co-defendant Bennett, Mrs. Howe, Janna Howe and Mrs. Bennett were present. Mrs. Howe told Mrs. Bihn that "if she didn't leave us alone, I would be forced to notify the F. B. I. that I thought they would be very interested in the gasoline coupons and others she was stealing from the bank." Mrs. Bihn replied: "Go ahead. Your son-in-law is in it just as deep as I am and if I go to prison he will go too" (6, 63, Ex. 9).

Mrs. Howe knew about the coupons which Mrs. Bihn had stolen because she and both her daughters (Mrs. Bennett and Janna Howe) had seen her son-in-law Bennett have in his possession in her house hundreds and perhaps thousands of coupons of all sorts (162, 8, 3, 4, 52, 53). Both she and her daughters had asked Bennett how he came to have these coupons, and Bennett replied that Mrs. Bihn gave them to him (58 ——).

Shortly after the quarrel on Mother's Day, Mrs. Bihn wrote a letter to the co-defendant Bennett, and enclosed a carbon copy of that letter in a separate envelope, addressed to Mrs. Howe (5, Ex. 1). Amongst other statements in that letter was a reference to the quarrel which took place on Mother's Day, and the following is contained in that letter: "I didn't miss the crack about the F. B. I. Looks to me like you are trying to break into prison with your bare hands. Don't worry I can take it. I haven't much more than that now. But I think confining you will hurt you worse than it will me" (Ex. 1).

Bennett stated to several of the Government witnesses that all the coupons he received he got from Mrs. Bihn (36). On another occasion he said that all the coupons he got were from a girl "he was fooling around with that worked in the bank". The girl had been previously iden-

[fol. 10] tified by the witness to whom the statement was made as Mrs. Bihn (43).

Part of Mrs. Bihn's duties at the bank with respect to rationing was to collect all rationing coupons which had been deposited with the bank and place them in a box for shipment to the Office of Price Administration. It was also Mrs. Bihn's duty to keep books showing the amount of

ration currency deposited in the bank (85). It was also Mrs. Bihn's duty to keep other bank records in respect to rationing (87-88, 86). These records were all kept accurately (95, 105). It was Mrs. Bihn's duty to check the ration deposits after she had received them from the bank tellers (93, 98), and it was also her duty to keep the custody and control of the ration currency after it had been deposited. Mrs. Bihn did not receive the ration evidence from the clients of the bank, this was done by the bank tellers (91) but she would later check the deposits against the deposit slips. Frequently the slips were for more than the deposits actually made (92). The gasoline ration coupons were kept in a steel letter file which was locked (98, 125). The keys to this file were kept in Mrs. Bihn's desk drawer which had no lock (99, 126). Mr. Travis, the bank cashier, had a key to the steel file. Three other persons, the note teller, assistant note teller and a stenographer had access to and the occasion to go to said steel file (99, 127) and they would not ask for the key of Mrs. Bihn, but would go to her desk and help themselves (127). Others may have gone to the steel file and taken ration tokens (99), according to Mr. Travis, and Mrs. Bihn testified that if the ration bookkeeper was not present to furnish information or ration tokens, another employee would take care of the client (127). Mrs. Bihn signed and prepared a document which represented that 156,795.5 gallons of gasoline had been delivered to the Office of Price Administration (Ex. 8, 89, 87). It was also Mrs. Bihn's duty when she had sealed the box preparatory to shipping to the [fol. 11] O. P. A. to prepare another document on which was noted the total contents of the box with respect to each type of ration currency included therein (83-85). This document was then presented to the cashier of the bank, the witness Travis, for his signature. When the shipment was due in the forepart of September, Travis watched Mrs. Bihn prepare the box for shipment. Mrs. Bihn sealed the box and presented to Travis the document she was required to make out. This document represented on its face that there were 156,795.5 gallons of gasoline ration currency in the box (Ex. 6). Travis took the box, after having watched Mrs. Bihn prepare it, and kept it at his desk until the bank's auditor arrived that night (83). The bank's auditor examined the box and found that there were only

119,772 gallons of ration currency in the box and that there were 37,023.5 gallons missing (115).

Subsequent to the time of indictment, and prior to trial of the case, the witness Janna Howe, the 17 year old sister-in-law of the co-defendant Bennett, received several 'phone calls at school from Mrs. Bihn who at one time said to her "* * * I better be careful and she would be waiting for me when I got out" (66).

In United States District Court

Charge of the Court

(Moscowitz, J.)

The Court: Members of the jury, the defendants Verna Mae Bihn and George Wesley Bennett were indicted by the Grand Jury on a charge of conspiracy to violate the law. The indictment charges that from on or about July 1, 1943 and continuously thereafter up to and including September 6, 1944 in the Southern District of New York, that is this District, the defendants did lawfully, wilfully [fol. 12] and knowingly combine, conspire, confederate and agree together and with each other and with divers other persons to the Grand Jurors unknown to violate Title 50, Appendix, Section 633, United States Code, and the rules, regulations and orders duly adopted and issued pursuant thereto; that it was part of the conspiracy that the defendants would unlawfully acquire, possess and transfer gasoline ration coupons, the exact number and type being to the Grand Jurors unknown, said defendants not being the persons or agents of the persons to whom said gasoline coupons were issued or by whom they were acquired, in accordance with regulations issued by the Price Administrator.

It was further a part of said conspiracy that the aforesaid defendant Verna Mae Bihn would steal, purloin and embezzle gasoline ration coupons, the exact number and type being to the Grand Jurors unknown, from the First National Bank of Poughkeepsie, New York.

It was further a part of the said conspiracy that the aforesaid defendant Verna Mae Bihn would transfer gasoline ration coupons, the exact number and type being to

the Grand Jurors unknown, to the defendant George Wesley Bennett and to others to the Grand Jurors unknown.

It was further a part of said conspiracy that the aforesaid defendant, George Wesley Bennett, would give, transfer and sell gasoline ration coupons, the exact number and type being to the Grand Jurors unknown, to one Joel Lewis and to others to the Grand Jurors unknown.

It was further a part of said conspiracy that the aforesaid defendants Verna Mae Bihn and George Wesley Bennett would share the moneys obtained from the sale of the aforesaid stolen ration coupons, the exact number and type being to the Grand Jurors unknown.

And then in the indictment follow overt acts, there being five in number: First, in pursuance of said conspiracy and, to effect the object thereof, at the Southern District of [fol. 13] New York and within the jurisdiction of this Court, on or about the 9th day of April, 1944 the defendants Verna Mae Bihn and George Wesley Bennett had a conversation.

Second, that in further pursuance of said conspiracy and to effect the objects thereof at the Southern District of New York, on or about and some time during the month of October, 1943 the defendant George Wesley Bennett had a conversation with Joel Lewis.

Third, that during the month of November, 1943 the defendant Bennett had a conversation with Joel Lewis.

Fourth, that during the month of June, 1944 the defendant Bennett had a conversation with the defendant Bihn; and the fifth and final overt act, that on or about the month of May, 1944 the defendant Bennett had a conversation with Janna Howe.

That is the indictment. That is the accusation. No inference whatever is to be drawn from the fact that the defendants were indicted. That is the legal means by which the case is presented to you and as I say no inference is to be drawn from the fact that the defendants here are indicted.

The defendants in this case as in all criminal cases are presumed to be innocent until proven guilty beyond a reasonable doubt, and that presumption of innocence stays with the defendants from the beginning to the end of the trial and until you are satisfied beyond a reasonable doubt of guilt.

The words "reasonable doubt" do not mean beyond all doubt. If that were the law you could not convict anyone. The law says "a reasonable doubt". A reasonable doubt means just what the words imply. It is a doubt which appeals to your reason, judgment and common sense and understanding. You cannot use that as a pretext or excuse or device to prevent you from performing an unpleasant duty.

[fol. 14] You and you alone are the sole and exclusive judges of the facts. Nothing said by the Court or counsel can take the place of your recollection of the facts, and even if the Court expresses an opinion on the testimony, it would not be binding upon you because it is for the Court to decide the law and it is your sole and exclusive province to decide the issues of fact, and in this case that means the guilt or innocence of the defendants on trial.

The Court has been called upon to rule on motions and objections. These rulings are matters of procedure only, and in and of themselves do not indicate any opinion on the part of the Court as to the innocence or guilt of the defendants. It is the province of the Court to decide the law and yours to decide the issues of fact.

As I have said, the indictment charges the defendants, and others whose names are unknown to the Grand Jury, with conspiracy to violate the law. You know, because you are all living in the United States, that because of the war situation there has been gasoline rationing and rationing of other materials and foods, and that various stamps have been issued, and that these stamps have value because without them you cannot secure the necessary gasoline or other commodities.

The Government charges here that these defendants entered into a conspiracy, that the conspiracy was to obtain the coupons and to sell them and get money for them.

A conspiracy is formed when two or more persons in any manner or through any contrivance come to a mutual understanding to accomplish a crime or unlawful purpose. It is a crime to unlawfully possess and transfer gasoline coupons. It is a crime to sell and embezzle such coupons. It is a crime to transfer them or give or sell or dispose of them. The Government charges that that is what these defendants did, that they entered into an agreement, an agreement to violate some law, and performed some overt act in the furtherance of that agreement. If that has been

[fol. 15] proven, the crime is complete. If not proven, there is no crime.

The elements of a criminal conspiracy are, first, an object to be accomplished; second, a plan or scheme embodying means to accomplish that object; third, an agreement or understanding between the two defendants whereby they became definitely committed to cooperate for the accomplishment of the object by the means embodied in the scheme or by any effectual means; and last by an overt act by one of these defendants, parties to the agreement, to effect the object of the conspiracy.

First, the object; second, the plan; third, the corrupt agreement; and last, by an act to carry out that agreement.

A conspiracy need not necessarily be established by direct evidence. Circumstantial evidence may be sufficient. Direct and circumstantial evidence differ merely in their logical relation to the fact in issue. Evidence as to the existence of the fact is direct. Circumstantial evidence is composed of facts which raise a logical inference as to the existence of the fact in issue. A conviction may well be had upon circumstantial evidence. To warrant such conviction the proven facts must not only be consistent with the hypothesis of guilt but must exclude every other hypothesis save that of guilt. Circumstantial evidence alone is enough to support a verdict of guilty if the jury believes beyond a reasonable doubt the defendant is guilty on the evidence.

Let me give you an example. In our daily lives, we conclude matters upon circumstantial evidence almost all of our waking moments. If you awoke on a summer morning with the temperature about 90 and you looked out and saw that the trees and everything were wet, and water running in the gutters, you might conclude that it had rained, although you didn't see it rain. Or if you happened to sleep through the hurricane we had recently and woke up and saw many trees down and the damage it caused, you could [fol. 16] conclude that it was a pretty big wind that hit us, although you slept through it and didn't see any of it or hear it. Those are two examples, and there are many, many more that must occur to you.

As I say, we are concluding matters upon circumstantial evidence all the time.

In a conspiracy case a formal agreement need not be proven. It is sufficient to show that the parties were act-

ing together, understandingly, to accomplish some unlawful act even though one of the conspirators may do acts in furtherance of the unlawful design apart from the other. Having satisfied yourselves beyond a reasonable doubt that the Government has shown the agreement, it makes no difference what overt act was done, as long as you find beyond a reasonable doubt that an overt act was done to carry out the agreement. You must first decide whether there was a corrupt agreement, for the reason that the overt act must be one of the acts subsequently done to carry into effect the object of the original agreement. Has the Government proved and satisfied you beyond a reasonable doubt that these two defendants are guilty of a corrupt agreement and the performance of an overt act to carry out the agreement? If that has been proven, then the defendants are guilty. Otherwise they are not.

Overt acts may be innocent acts in and of themselves, or criminal in their very nature. To constitute an offense not only should an unlawful agreement be proved, but that one of the parties did an act to carry it out. Without an overt act it is no crime. The conspiracy is not effective until an overt act is committed by one or more of the conspirators.

Persons may conspire together to commit an offense against the United States, but if it stops with the agreement and nothing is done to carry into effect the object of the agreement, no criminal offense is committed; but the moment any act is done by any of the parties to the agreement, although the act in itself may be innocent, if the act [fol. 17] is done to effect the object of the conspiracy, that moment criminal liability is fixed. It may be done by only one party, but it binds the other party to the agreement, as all parties are concerned in the agreement. It makes no difference how many overt acts may be committed, they are not binding unless committed by parties to the agreement. But being parties to the agreement, they are responsible for whatever is done by any party to the agreement. Anything done by a conspirator in furtherance of the conspiracy, or anything said by a member of the conspiracy during the life of the conspiracy is binding upon the parties to the conspiracy. Any statements made subsequent to the conspiracy are only binding on the one who makes them. But, during the life of the conspiracy, any act that is done or any statement made in furtherance of the conspiracy is,

binding on the parties to the conspiracy even though the other party was not present.

In other words, a conspiracy is very much like a drama. There must be at least two actors. Some conspiracies have more, but you must have at least two.

The Government claims here that the part of one of the parties, Verna Mae Bihn, was to steal the stamps from the bank and hand them over to the defendant Bennett to dispose of them and that they would divide the money.

The defendant Bihn has taken the witness stand and she denies that she had any part in this conspiracy and says that she was employed in the bank—I am referring to the testimony, not for the purpose of emphasis, but to aid you in arriving at a verdict. You will consider all the testimony and evidence—but her testimony as I see it is that she was employed by the bank for some little time; she was a former school teacher and is a person of some intelligence and she was employed to keep the records of these stamps. It was her duty, as she says, to count the stamps and to check them, and if a depositor claimed too many, to detect it and send out word to him, that she said she did. [fol. 18] As we all know these stamps are rather important in these days. Without stamps for gasoline, you cannot use a car and if we didn't have stamps for food, we wouldn't eat. This is for the purpose of regulating the distribution of these various products because we are in a great war which is taxing the strength of this country. This law, this ration law, was passed and under it these stamps are of great value.

It was the defendant Bihn's duty to keep accurate records, to check these stamps. To show how careful they were, two people had to go to the incinerator when they were burned. The man who accompanied the defendant Bihn was a watchman at the bank or something of that kind. It was her duty to count the stamps, and after counting them, it was her duty to present to the cashier papers such as Exhibit 6 to be signed by the cashier. This was presented by the defendant Bihn to the cashier and the cashier refused to sign it and he had an accountant check it—Exhibit 5—then you heard the testimony as to the shortage of 37,023.5 gallons. That is a good deal of gasoline. The cashier refused to sign it and had a check made to find the shortage.

Her claim is that other people had access to these stamps. I don't know, perhaps she tries to suggest by inference that somebody else in the bank took them. But it was her responsibility to take charge of the stamps and count them and prepare this paper and see to it that this paper was accurate, and she submitted it to the cashier for signature and this shows the number of gallons which as I said had been testified to as being short 37,000 odd gallons.

Who would have a motive to steal them? Did she take these stamps? You have a right to consider that. She is not charged with stealing, but with conspiracy to do all these things, and you have a right to consider whether she did steal them, on the question of intent. Did she steal them? Who did if she didn't? Your are to decide that. [fol. 19] Did she turn them over to Bennett to dispose of them? You have heard the testimony of the witnesses for the Government and of the witnesses for the defendant.

Mrs. Howe, the mother, you heard her testimony; how did that impress you? Did she impress you as somebody who would take the witness stand and deliberately commit perjury? And her daughters. You have also heard the testimony of Bennett where he testified before the Grand Jury and spoke of his participation in the disposition of the stamps.

You heard the testimony of the witnesses about having received stamps from him. Well, you are to decide it. Please do not lay aside your common sense when you decide it Apply it.

If any witness has wilfully testified falsely to a material fact, you have a right to disregard all the testimony of such witness or to retain such part as you believe. Use your common sense; such common sense as you use in your everyday lives. No greater judgment is required than that. True, you do not sit as jurors 365 days a year, but you do exercise judgment, I hope. I am sure you do. Use that judgment. A man may make a business proposition to you and you observe his demeanor and the way he expresses himself, whether he is frank, honest and truthful, and you decide whether you believe that man and you say, "Yes, I will take the word of that man against a dozen people."

Then you take another man and you say, "I will have nothing to do with him, not if he swore on a stack of Bibles as high as the world."

It is your duty to judge the credibility of a witness and his interest. Now just because a witness is interested does not mean that you are not to believe him. The law says you may consider his interest. How much has that interest altered or colored or motivated his testimony?

Conspiracies are usually formed in secret. I have never heard of one where the officials and the Police Department [fol. 20] and members of the Federal Bureau of Investigation and Judges and District Attorneys were invited to the City Hall at a certain time and place so that a certain conspiracy might be formed. I doesn't happen that way. These matters are done secretly. And it is not always by word of mouth; it may be by general understanding, the conduct of the parties.

Consider all those phases. You have to decide it. Were these two defendants engaged in a conspiracy to do any of these things charged, to acquire unlawfully these coupons, to possess them unlawfully, to transfer them, to steal them from the bank?

Did they agree and conspire as to that and did they perform an overt act? If so, they would be guilty. You are to say by your verdict.

A defendant is not required to establish his innocence but the Government must establish guilt beyond a reasonable doubt. If the facts and circumstances surrounding the case are as consistent with innocence as with guilt, he is not guilty. If the Government has established guilt beyond a reasonable doubt, you will find these defendants guilty.

This case is serious for the defendants and serious for the Government. You said at the beginning you would be fair to the Government and to the defendants. That is all I ask, a fair verdict upon the evidence and the evidence alone.

If a fact is once established you have a right to draw reasonable inferences from that evidence. Just apply your common sense. But you cannot draw an inference from an inference; but if a fact is established then you may draw an inference upon the fact established to your satisfaction.

Of course these defendants are not charged with any immoral acts here. That is not what we are trying here. But you may consider their relationship in connection [fol. 21] with the question of whether or not they did

commit a crime. I don't mean that they are to be convicted because of that. Of course not. But their interest in each other you may consider, as to whether they had any conversations and what their acts were. They are not to be convicted because of any immorality. That is not the charge.

You have heard the testimony of the witnesses. The trial has been very brief. I think if you apply your common sense you will have no difficulty in arriving at a proper verdict.

You are not concerned with the consequences of your verdict. Lay aside all consideration of prejudice, bias or sympathy.

I asked you if you would be fair and I asked you to be fair to the Government and to the defendants. Now take the case with an eye single to performing your duty.

The verdict will be either innocent or guilty as to each defendant.

Mr. Chapman: The defendant Bihn takes exception to your Honor's charge that she was charged with the duty of counting the stamps and preparing Government Exhibit 6.

The Court: I understood her to so testify. It is the jury's recollection of the facts that will control. If your recollection doesn't agree with mine you are to disregard my recollection. That was my recollection, that she testified that she prepared Exhibit 6 after reconciling it with the number of stamps. However your recollection will control.

Mr. Chapman: May I state my recollection?

The Court: No.

Mr. Chapman: I respectfully except. And I take exception to your Honor's charge to the jury that it is the jury's duty to find out who did steal the stamps. "Did she? Who did if she did not? You are to decide that." I except to that because it not part of the jury's duty.

[fol. 22] The Court: Yes, I say that was not the crime but the question is whether these defendants entered into a conspiracy to steal, possess and transfer these stamps.

Mr. Chapman: That is not the point of my exception, your Honor. I take further exception to your Honor's comment on the witness Susan Howe and Susan Bennett and Janna Bennett and I take exception to your Honor's

charge that the Grand Jury testimony of Bennett may be considered. That testimony is not binding on the defendant Bihn.

The Court: I said that two or three times during the trial and I repeat it now.

Mr. Saypol: In the course of the charge the Court made two statements which I think should be excepted to. Your Honor said to the jury "You cannot use reasonable doubt as a pretext for the performance of your duty."

The Court: I didn't say that. I said that they cannot use it as an excuse for failing to perform a duty. Of course the Government must establish the question of guilt beyond a reasonable doubt.

Mr. Saypol: Once they have a reasonable doubt they must stop.

The Court: Of course.

Mr. Saypol: I take an exception to the statement as to Mrs. Bihn's testimony as to the access of others to the coupons contained in the box, Government's Exhibit 5, to the rhetorical question which the Court asked, "Who would have a motive to steal it?" I say that is no concern of the jury and I ask that my exception be noted.

Mr. Chapman: I join in that, your Honor.

Mr. Saypol: I have some requests to hand up.

The Court: Why didn't you hand them up before you summed up?

Mr. Saypol: I didn't have them prepared then, your Honor.

[fol. 23] The Court: Let me take them. Of course one person alone cannot form a conspiracy.

Mr. Saypol: If the jury acquits one——

The Court: You except to what I said?

Mr. Saypol: Yes.

The Court: Very well. The law recognizes the difference between the crime of conspiracy and a conspiracy to commit a crime. I have told them that a conspiracy is one crime and that persons may conspire to commit other crimes.

Of course the verdict must be unaminous.

You take the case and consider it and be fair. I will send you the exhibits.

Mr. Hartfield: May I ask that the Court charge the jury that they will find listed in the indictment five overt acts and it is only necessary to find one.

The Court: If they have proved one overt act that is enough. They do not all have to be proved.

(The jury retired at 3:05 P. M.)

(At 5:10 P. M. the jury returned in the court.)

The Clerk: Miss Foreman, have you agreed on a verdict?
The Foreman: We have.
The Clerk: How do you find?
The Foreman: We find both defendants guilty of the charge of conspiracy.

(On motion of the defendants the jury was polled and each of the jurors stated that the verdict as above entered was his or her verdict.)

Mr. Chapman: On behalf of the defendant Bihn I move that the verdict be set aside as contrary to the law, contrary to the evidence and contrary to the weight of the evidence.
Mr. Saypol: I make the same motion.
The Court: Motions are denied.

[fol. 24] Sentence is adjourned to February 9, 1945, at 10:30 A. M. Defendant Bihn paroled on her own recognizance as to this case and bail continued on indictment 118-361. The defendant Bennett is remanded.

In District Court of the United States, Southern District of New York

C. 119-66

Violation of U. S. C. Title 18 Sec. 88.

United States of America vs. Verna Mae Bihn.

Conspiracy to possess and transfer gasoline ration coupons.

Judgment and Commitment

On this 9th day of February 1945, upon the proceedings heretofore had herein and on motion of the United States Attorney, it is by the Court

Ordered and adjudged that the defendant be hereby committed to the custody of the Attorney General or his authorized representative for imprisonment in an institution

to be designated by the Attorney General or his authorized representative for the period of One Year and One Day. Defendant to surrender on 2-16-45. Released on own recognizance.

The Court recommends that defendant be sent to Federal Reformatory for Women, Alderson, W. Va.

It is further ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

Grover M. Moscowitz, United States District Judge.

[fol. 25] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL AND GROUNDS OF APPEAL

Name and Address of Appellant

Verna Mae Bihn—Casa, Arkansas.

Name and Address of Attorney for Appellant

Henry K. Chapman, 291 Broadway, Borough of Manhattan, New York 7, N. Y.

Offense

The appellant, Verna Mae Bihn, and the defendant, George Wesley Bennett, were charged with conspiracy to violate Title 50, Appendix, Section 633, United States Code, in that they would unlawfully acquire, possess and transfer gasoline ration coupons, said defendants not being the persons or agents of the persons to whom said gasoline ration coupons were issued or by whom they were acquired.

DATE OF JUDGMENT—February 9, 1945

Description of Judgment

The appellant was convicted by the verdict of a jury on the 1st day of February, 1945, on the charge set forth in [fol. 26] Indictment C119-66, to wit: conspiracy to violate Title 50, Appendix, Section 633, in that they would unlawfully acquire, possess and transfer gasoline ration coupons,

said persons not being the persons or agents of the persons to whom said gasoline ration coupons were issued or by whom they were acquired in accordance with the regulations issued by the Office of Price Administration.

Sentence

On February 9, 1945, the appellant, Verna Mae Bihn, was sentenced to serve one year and one day in the Federal Womens Reformatory at Alderson, West Virginia.

The appellant, Verna Mae Bihn, is presently at liberty, the execution of her sentence having been stayed pending an application for bail to be given while her appeal is pending.

I, the undersigned appellant, hereby appeal to the United States Circuit Court of Appeals for the Second Circuit, from the judgment of conviction on the grounds set forth hereinbelow.

Verna Mae Bihn, Appellant.

Grounds of Appeal

1. The court erred in refusing to strike out portions of the evidence as to the Appellant herein for the reasons set forth in the motion to strike which said motion was made at the end of the Government's case and the end of the whole case.

2. The court erred in not granting the motion to dismiss the indictment made at the close of the Government's case and the end of the whole case, when it was repeated, and in refusing to grant the motions made to direct a verdict of acquittal as to the appellant.

[fol. 27] 3. The court erred in refusing to grant the motion to dismiss the indictment and to direct a verdict of acquittal at the end of the whole case on the ground that the Government had failed to establish the guilt of the appellant beyond a reasonable doubt.

4. The court erred in denying the motion made at the close of the entire case, to dismiss the indictment and to direct a verdict of acquittal, on the ground that the conspiracy as charged in the indictment had not been proved.

5. The court erred in refusing to grant the motion made on behalf of the appellant to set aside the verdict of the

jury as being contrary to the weight of the credible evidence and as contrary to the law.

6. The court erred in its charge to the jury as to the law in the case.

To Hon. John F. X. McGoey, United States Attorney for the Southern District of New York, U. S. Court House, Foley Square, Borough of Manhattan, New York City.

Clerk, United States District Court for the Southern District of New York, Foley Square, Borough of Manhattan, New York City.

[fol. 28] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENTS OF ERROR

The appellant, Verna Mae Bihn, makes the following assignments of error in the above entitled cause, to wit:

1. The court erred in its charge to jury by instructing it as follows:

> "Her claim is that other people had access to these stamps. I don't know, perhaps she tries to suggest by inference that somebody else in the bank took them. But it was her responsibility to take charge of the stamps and count them and prepare this paper and see to it that this paper was accurate, and she submitted it to the cashier for signature and this shows the number of gallons which as I said had been testified to as being short 37,000 odd gallons.
>
> Who would have a motive to steal them? Did she take these stamps? You have a right to consider that. She is not charged with stealing, but with conspiracy to do all these things, and you have a right to consider whether she did steal them, on the question of intent. Did she steal them? Who did if she didn't? You are to decide that."

for the reason that by this instruction the court shifted the burden of proof to the defendant, Bihn, requiring the jury, [fol. 29] in effect, to find that she had by her proofs eliminated the possibility of her guilt.

2. The court erred in charging the jury, "Who would have a motive to steal them?", since the motive of other persons with access to the stamps, but not on trial, was not in issue.

3. The court erred in charging "Did she steal them?" "Who did if she didn't?" "You are to decide that." This was not any part of the jury's duty and said instructions served only to impress on the jury that it was incumbent on the defendant, Bihn, by her testimony to eliminate herself from those who could have stolen the ration coupons.

4. The court's charge "that the law recognizes the difference between the crime of conspiracy and a conspiracy to commit a crime", was erroneous, confusing and misleading.

Respectfully submitted, Henry K. Chapman, Attorney for Defendant-Appellant.

[fol. 30] In United States Circuit Court of Appeals For the Second Circuit.

[Title omitted]

Stipulation as to Exhibits

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto, that the printing of the exhibits in the within action may be dispensed with and that in lieu thereof, the originals may be submitted to the court upon the argument of the appeal and that an order to said effect may be entered without further notice to either party.

Dated: July ——, 1945.

John F. X. McGohey, United States Attorney, Henry K. Chapman, Attorney for Defendant-Appellant.

[fol. 31] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

[Title omitted]

STIPULATION AS TO RECORD

It is hereby stipulated that the foregoing Bill of Exceptions has been agreed upon as the record to be submitted to the United States Circuit Court of Appeals for the Second Circuit in the above entitled matter, and that the Clerk may certify the same as the record on appeal.

Dated: New York, July ——, 1945.

John F. X. McGohey, United States Attorney, Henry K. Chapman, Attorney for Defendant-Appellant.

[fol. 32] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 33] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1945

No. 82

(Argued October 8, 1945. Decided November 15, 1945)

UNITED STATES OF AMERICA

against

GEORGE WESLEY BENNETT, Defendant, and VERNA MAE BIHN, Defendant-Appellant

Before L. Hand, Chase and Frank, Circuit Judges

Appeal from a Judgment of the District Court for the Southern District of New York. Affirmed

John F. X. McGohey, United States Attorney, for Appellee; David Hartfield, Jr., Assistant United States Attorney, of Counsel.

Henry K. Chapman, for Defendant-Appellant.

[fol. 34] CHASE, Circuit Judge:

The appellant was tried in the District Court for the Southern District of New York on an indictment charging that she and one George Wesley Bennett conspired together and with others unlawfully to acquire, possess and transfer gasoline ration coupons in violation of the provisions — 50 U. S. C., Appendix, § 633 and of the rules, regulations and orders duly adopted and promulgated pursuant thereto by the Office of Price Administration. It was alleged to be a part of the conspiracy that the appellant would steal gasoline ration coupons from the First National Bank of Poughkeepsie, New York; transfer them to Bennett; and share with Bennett the money obtained from the sale of them. After a trial by jury both the appellant and Bennett were found guilty and she has appealed from the judgment and sentence imposed upon her.

She relies wholly upon claimed error in the charge as ground for reversal and to understand the significance of that it will be helpful now to refer to what is called in the

record on appeal the "Stipulation of Agreed Facts" which follows:

"It is hereby stipulated and agreed by and between the appellant and the United States Attorney for the Southern District of New York that the following constitutes a narrative statement of facts in the case of United States v. Verna Mae Bihn and George Wesley Bennett. The parties to this stipulation agree that the facts mentioned hereafter are accurate, but neither party is precluded from referring to additional facts in the record on the argument of the appeal.

[fol. 35] Statement of Facts

"Appellant Verna Mae Bihn, the defendant George Wesley Bennett, and the husband of Mrs. Bihn, lived in the same three room apartment in Poughkeepsie from some time in August 1943, until February, 1944, at which time Bennett left the Bihn household to get married (Ex. 9). Mrs. Bihn was employed during this period of time at the First National Bank of Poughkeepsie. Her duties there during the greater part of her employment which extended from late summer of 1943 until the first part of September 1944, were in the main connected with rationing and the necessary bookkeeping attached to the rationing functions which the bank undertook on behalf of the Government (79).

"During the period when Bennett was living in the Bihn household, Mrs. Bihn on many occasions would bring home gasoline ration coupons. When Mrs. Bihn's husband was not present, Mrs. Bihn would give these coupons to Bennett. Bennett would take these coupons, sell them, return home and divide the money received from the sale of these coupons with Mrs. Bihn (Exs. 9, 47, 41). Sometimes Mrs. Bihn would bring home loose gasoline ration stamps and sometimes she would bring home gasoline ration stamps already affixed to gummed O. P. A. forms called O. P. A. Forms R 120 (known in the gasoline trade as 'bingo' sheets). Mrs. Bihn brought these stamps home to Bennett on approximately ten occasions. The average amount of coupons which she brought home was between 300 and 500 gallons each time. The largest amount of coupons that Mrs. Bihn ever brought to Bennett was between

500 and 600 gallons. When these coupons were affixed [fol. 36] to 'bingo' sheets, Mrs. Bihn would soak these coupons in water and give them to Bennett to sell after they had been removed from the gummed 'bingo' sheets on which they had been affixed (Ex. 9).

"When Bennett moved to his new home in February, there were resident in this new home, in addition to his wife, the witnesses Sussana Howe and Janna Howe, respectively, the mother-in-law and sister-in-law of the defendant Bennett (3, 61).

"One Sunday in May of 1944, Mrs. Bihn approached the home of the Bennetts and remained outside (51). Mrs. Howe asked her to leave. There ensued an altercation during which the co-defendant Bennett, Mrs. Howe, Janna Howe and Mrs. Bennett were present. Mrs. Howe told Mrs. Bihn that 'if she didn't leave us alone, I would be forced to notify the F. B. I., that I thought they would be very interested in the gasoline coupons and others she was stealing from the bank.' Mrs. Bihn replied: 'Go ahead. Your son-in-law is in it just as deep as I am and if I go to prison he will go too' (6, 63, Ex. 9).

"Mrs. Howe knew about the coupons which Mrs. Bihn had stolen because she and both her daughters (Mrs. Bennett and Janna Howe) had seen her son-in-law Bennett have in his possession in her house hundreds and perhaps thousands of coupons of all sorts (162, 8, 3, 4, 52, 53). Both she and her daughters had asked Bennett how he came to have these coupons, and Bennett replied that Mrs. Bihn gave them to him (58).

"Shortly after the quarrel on Mother's Day, Mrs. Bihn wrote a letter to the co-defendant Bennett, and enclosed a carbon copy of that letter in a separate envelope, addressed to Mrs. Howe (5, Ex. 1). Amongst [fol. 37] other statements in that letter was a reference to the quarrel which took place on Mother's Day, and the following is contained in that letter: 'I didn't miss the crack about the F. B. I. Looks to me like you are trying to break into prison with your bare hands. Don't worry I can take it. I haven't much more than that now. But I think confining you will hurt you worse than it will me' (Ex. 1).

"Bennett stated to several of the Government witnesses that all the coupons he received he got from

Mrs. Bihn (36). On another occasion he said that all the coupons he got were from a girl 'he was fooling around with that worked in the bank.' The girl had been previously identified by the witness to whom the statement was made as Mrs. Bihn (43).

Part of Mrs. Bihn's duties at the bank with respect to rationing was to collect all rationing coupons which had been deposited with the bank and place them in a box for shipment to the Office of Price Administration. It was also Mrs. Bihn's duty to keep books showing the amount of ration currency deposited in the bank (85). It was also Mrs. Bihn's duty to keep other bank records in respect to rationing (87-88, 86). These records were all kept accurately (95, 105). It was Mrs. Bihn's duty to check the ration deposits after she had received them from the bank tellers (93, 98), and it was also her duty to keep the custody and control of the ration currency after it had been deposited. Mrs. Bihn did not receive the ration evidence from the clients of the bank, this was done by the bank tellers (91) but she would later check the deposits against the deposit slips. Frequently the slips were for more than the deposits actually made (92). The gasoline ration coupons were kept in a steel letter file which was [fol. 38] locked (98, 125). The keys to this file were kept in Mrs. Bihn's desk drawer which had no lock (99, 126). Mr. Travis, the bank cashier, had a key to the steel file. Three other persons, the note teller, assistant note teller and a stenographer had access to and the occasion to go to said steel file (99, 127) and they would not ask for the key of Mrs. Bihn, but would go to her desk and help themselves (127). Others may have gone to the steel file and taken ration tokens (99), according to Mr. Travis, and Mrs. Bihn testified that if the ration bookkeeper was not present to furnish information or ration tokens, another employee would take care of the client (127). Mrs. Bihn signed and prepared a document which represented that 156,795.5 gallons of gasoline had been delivered to the Office of Price Administration (Ex. 8, 89, 87). It was also Mrs. Bihn's duty when she had sealed the box preparatory to shipping to the O. P. A. to prepare another document on which was noted the total contents of the box with

respect to each type of ration currency included therein (83-85). This document was then presented to the cashier of the bank, the witness Travis, for his signature. When the shipment was due in the forepart of September, Travis watched Mrs. Bihn prepare the box for shipment. Mrs. Bihn sealed the box and presented to Travis the document she was required to make out. This document represented on its face that there were 156,795.5 gallons of gasoline ration currency in the box (Ex. 6). Travis took the box, after having watched Mrs. Bihn prepare it, and kept it at his desk until the bank's auditor arrived that night (83). The bank's auditor examined the box and found that there were only 119,772 gallons of ration currency in the box and that there were 37,023.5 gallons missing (115).

[fol. 39] "Subsequent to the time of indictment, and prior to trial of the case, the witness Janna Howe, the 17 year old sister-in-law of the co-defendant Bennett received several 'phone calls at school from Mrs. Bihn who at one time said to her '* * * I better be careful and she would Be waiting for me when I got out' (66)."

While the introductory paragraph of this stipulation refers to what follows as "a narrative statement of facts" and it is stated that the "parties to this stipulation agree that the facts mentioned are accurate" they also reserved the right to refer "to additional facts in the record on the argument for appeal." It is fairly evident from this reservation that the appellant did not concede that the actual facts were as stated but that there was evidence which, if believed, would have supported findings by the jury that the facts were as stated in the stipulation. That is enough to show that there was evidence on which to submit the case against the appellant to the jury and no argument to the contrary has been made. To be sure the appellant's own testimony and other evidence she introduced, some of which tended to show that some of the government's witnesses were biased and prejudiced against her, required the jury to resolve issues as to credibility and the weight to be given the evidence found worthy of belief before it could find a verdict of guilty and perhaps not all the so-called facts in the stipulation were found by the jury. That

is immaterial now since the transcript of what transpired at the trial is a part of the record on appeal. We may, and do, look to that to discover, regardless of the stipulation of the parties, whether there was sufficient, though in part contradicted, evidence to support the verdict and find that there was.

[fol. 40] The evidence that gasoline ration coupons had been stolen from the bank was so clear and undisputed that it was a foregone conclusion that the jury would so find. The claimed error is not that the judge took that for granted in his charge. It is that he instructed the jury in effect that it must decide not only that the appellant did not steal them, but who did, before it could acquit her, thus putting the burden upon her to prove her innocence by showing the identity of the thief or thieves. If the charge is fairly open to such an attack reversible error was committed, for of course the appellant had no burden to prove anything but was presumed to be innocent and was entitled to be acquitted if the evidence as a whole was merely too inconclusive to prove her guilt to the satisfaction of the jury beyond a reasonable doubt. *Powell* v. *Alabama*, 287 U.S. 45; *U. S.* v. *Wishnatzki*, 2 Cir. 77 F. (2) 357.

After charging adequately and accurately on the burden of proof, presumption of innocence, the conspiracy as laid in the indictment and what had to be proved to establish the guilt of the appellant, the judge called the attention of the jury to the appellant's defense as follows:

> "Her claim is that other people had access to these stamps. I don't know, perhaps she tries to suggest by inference that somebody else in the bank took them. But it was her responsibility to take charge of the stamps and count them and prepare this paper and see to it that this paper was accurate, and she submitted it to the cashier for signature and this shows the number of gallons which as I said had been testified to as being short 37,000 odd gallons.
>
> "Who would have a motive to steal them? Did she take these stamps? You have a right to consider that. She is not charged with stealing, but with conspiracy [fol. 41] to do all these things, and you have a right to consider whether she did steal them, on the question of intent. Did she steal them? Who did if she didn't?

You are to decide that. Did she turn them over to Bennett to dispose of them? You have heard the testimony of the witnesses for the Government and of the witnesses for the defendant."

The appellant's trial attorney took exception to the "charge to the jury that it is the jury's duty to find out who did steal the stamps.' 'Did she? Who did if she did not? You are to decide that.' I except to that because it is not part of the jury's duty." The judge disposed of this exception by saying, "Yes, I say that was not the crime but the question is whether these defendants entered into a conspiracy to steal, possess and transfer these stamps." The attorney replied, "That is not the point of my exception, your Honor," and so the matter was left.

Although the attorney thus indicated that he knew the judge had not understood the "point" of his exception, he made no effort to make that clear. If it could reasonably be thought that any juror might have misunderstood the judge to mean that, contrary to what he had already clearly charged on the burden of proof and the presumption of innocence, the appellant was bound to prove who did steal the stamps if she did not, it would still be obvious that the attorney was apparently satisfied to take the exception he did rather than to take adequate steps to point out the claimed error, or ambiguity, in the charge. Had the experienced judge who tried this case been aware that the attorney was objecting on the ground which has been argued in this court, it is inconceivable that he would not have made it abundantly plain at once that his language should not have been so construed or misconstrued.

[fol. 42] However that may be, the language used is not, we think, ambiguous in its setting or reasonably to be understood to mean that the appellant had the burden to prove anything as a condition upon her acquittal. Almost in the same breath the judge told the jury that the appellant was not charged with stealing the coupons "but with conspiracy to do all these things" and that "you have a right to consider whether she did steal them, on the question of her intent. Did she steal them? Who did if she didn't? You are to decide that." The fair import of such language is not that the jury had to determine who in fact stole the coupons if it failed to find that she did but to decide whether

she or someone else stole them and to consider that in determining whether she intentionally participated in a conspiracy as charged.

Judgment affirmed.

Frank, Circuit Judge, dissents with separate opinion.

Frank, Circuit Judge (dissenting):

1. In order to explain my dissent, it is first necessary to point to some facts not mentioned in the majority opinion. Those facts will, I think, dissipate what seems to me to be the incorrect impression created by that opinion that almost certainly appellant was guilty, as charged, of stealing the coupons and giving them to the co-defendant Bennett (who, having expressly admitted that he had illegal possession of them, was found guilty and sentenced, and who does not appeal). For the transcript of the evidence at the trial, by reference made a part of the record in this court, shows the following:

[fol. 43] (a) The co-defendant, Bennett, did not testify; but statements made by him out of court were offered in evidence. The trial judge explicitly ruled (and correctly) that these statements were admissible as against Bennett, but must not be considered by the jury with reference to appellant, Bihn. It was, however, solely from those statements thus made by Bennett that there derives the following portion of the stipulation:

"During the period when Bennett was living in the Bihn household, Mrs. Bihn on many occasions would bring home gasoline ration coupons. When Mrs. Bihn's husband was not present, Mrs. Bihn would give these coupons to Bennett. Bennett would take these coupons, sell them, return home and divide the money received from the sale of these coupons with Mrs. Bihn. Sometimes Mrs. Bihn would bring home loose gasoline ration stamps and sometimes she would bring home gasoline ration stamps already affixed to gummed O. P. A. forms called O. P. A. Forms R 120 (known in the gasoline trade as 'bingo' sheets). Mrs. Bihn brought these stamps home to Bennett on approximately ten occasions. The average amount of coupons which she brought home was between 300 and 500 gallons

each time. The largest amount of coupons that Mrs. Bihn ever brought to Bennett was between 500 and 600 gallons. When these coupons were affixed to 'bingo' sheets, Mrs. Bihn would soak these coupons in water and give them to Bennett to sell after they had been removed from the gummed 'bingo' sheets on which they had been affixed * * * Bennett stated to several of the Government witnesses that all the coupons he received he got from Mrs. Bihn."

As Bennett's statements were not in evidence as to appellant, these portions of the stipulation should, I think, be wholly disregarded.

[fol. 44] (b) The transcript of the evidence shows that Bennett's wife, mother-in-law and sister-in-law were jealous of appellant because of her relations with Bennett before his marriage. Yet it was solely from their testimony that the following portion of the stipulation derives:

"Mrs. Howe told Mrs. Bihn that 'if she didn't leave us alone, I would be forced to notify the F. B. I., that I thought they would be very interested in the gasoline coupons and others she was stealing from the bank.' Mrs. Bihn replied: 'Go ahead. Your son-in-law is in it just as deep as I am and if I go to prison he will go too.'"

The transcript shows that appellant, who took the witness-stand and denied that she had stolen any coupons, gave a different version of these remarks: She testified that, on that occasion, Bennett's sister-in-law and mother-in-law had accused her of having written certain letters to Bennett; that she had then denied having done so; and that the mother-in-law had then said to her "I think the F. B. I. will be interested to know about you," but made no mention of gasoline coupons. Appellant admitted that later she wrote a letter to Bennett saying, "I didn't miss that crack about the F. B. I. * * * It looks to me you are trying to break into prison with your bare hands * * * It will hurt you more than me." She testified concerning this letter as follows:

> "Q. What did you mean by, 'It looks to me you are trying to break into prison with your bare hands'? A. Because he showed me a postcard his wife received and asked me if I wrote it, and I asked him if he wrote it. He told me once about having written a postal-

card to another girl to get rid of her, and it looked like the same method to me.

[fol. 45] "Q. What did you mean by saying, 'It will hurt you more than me'? A. Because they talked, the sister-in-law and the mother-in-law, about the letters that they were going to the F. B. I. with."

(c) The transcript also shows the following: As, from time to time, the coupons were deposited in the box, appellant made entries of the deposits. Subsequently, without again examining the contents of the box, appellant, from her previous entries, compiled the written statement which, it turned out, gravely overstated the amount of gasoline represented by the coupons in the box. But, in the interval between the time when she made her first entries and the time when she prepared the inaccurate statement, not less than four persons other than appellant had had access to the box; among them was a Miss Shannon with whom (so appellant testified) Bennett had a far more than casual acquaintance.

2. Thus, disregarding (as we should) that part of the stipulation based upon Bennett's statements, there is no direct evidence of theft by appellant except the testimony of Bennett's wife, mother-in-law and sister-in-law, which might easily have been biased. The only other evidence of her guilt consists of an inference which could reasonably —but need not—be drawn from the gross inaccuracy of the written statement made by appellant of the contents of the box. Accordingly the verdict may well have turned on whether such an inference was made by the jury.

In these circumstances—and remembering that the indictment charged, as an essential part of the conspiracy, that appellant had stolen the coupons—it was of course entirely legitimate for appellant to argue thus to the jury: Since any one of four other persons might have stolen the [fol. 46] coupons, there could easily be a reasonable doubt as to appellant's guilt. That issue was obviously crucial.

It was in this context that the judge, in the middle of his instructions, told the jury: "Who would have a motive to steal them? Did she take these stamps? You have a right to consider that. She is not charged with stealing, but with conspiracy to do all these things, and you have a

right to consider whether she did steal them, on the question of intent. *Did she steal them? Who did if she didn't? You are to decide that.*"

Considering what I have called the "crucial issue," it is highly likely that the jurors did not take this remark lightly. They had before them uncontradicted evidence by which, as they knew, appellant was trying to persuade them that, since the coupons might have come into Bennett's possession via any one of four other persons, there was a reasonable doubt as to appellant's guilt. Literally interpreted, the judge's charge told them that this was not sufficient to justify acquittal, for it was their "duty" (a) to decide that appellant committed the theft unless (b) they decided that some other specific person did. So interpreted, this charge erred by putting on appellant the burden of proving her innocence by proving the identity of some other person as the thief. See, e.g., *Boatright* v. *United States*, 105 F. (2d) 737, 740 (C. C. A. 8); *Ward* v. *United States*, 96 F. (2d) 189, 192 (C. C. A. 5); cf. *United States* v. *Wishnatzki*, 77 F. (2d) 357, 360 (C. C. A. 2). The charge would perhaps not have been so interpreted by one with a well trained legal mind; but the Supreme Court has admonished us that the minds of jurors, not being so trained, are usually incapable of subtle discriminations. *Shepard* v. *United States*, 290 U. S. 96, 104. As we have no basis for assuming that the jurors did not accept this charge at its face value, I think we should conclude that it was prejudicially erroneous.

[fol. 47] True, the judge also gave the usual general instructions about the burden of proof and presumption of innocence. But, in the face of this specific instruction, the best that can be said is that the jurors may easily have been confused. It has often been held that a verdict should be reversed where, when general instructions are inconsistent with a specific instruction, the jury may have been confused. See, e. g., *Drossos* v. *United States*, 2 F. (2d) 538, 539 (C. C. A. 8); *Cummings* v. *Pennsylvania R. Co.*, 45 F. (2d) 152 (C. C. A. 2); *Schroble* v. *Lehigh Valley R. Co.*, 62 F. (2d) 993, 996 (C. C. A. 2); cf. *Shepard* v. *United States*, *supra*.

When the judge had concluded his instructions, appellant's lawyer excepted as follows: "I take exception to your Honor's charge to the jury that it is the jury's duty to find out who did steal the stamps. 'Did she? Who did

if she did not? You are to decide that.' I except to that because it is not part of the jury's duty."

That was a clear enough statement of the nature of the judge's error; surely clear enough for one whom my colleagues characterize as an "experienced trial judge." It advised him that it was erroneous to tell the jury that, as part of its duty, in order to acquit, it must decide what person stole the coupons if appellant did not. The judge, thus warned, did nothing to correct the error, saying merely, "Yes, I say that was not the crime, but the question is whether these defendants entered into a conspiracy to steal, possess, and transfer these stamps." If that meant anything it meant that appellant was not charged with the substantive crime of theft but with theft as part of a conspiracy, a question not raised by the exception. This comment did not correct the erroneous instruction that unless, from the evidence, the jury found that some other identified person stole the coupons, it must conclude that appellant did.

[fol. 48] After the trial judge thus commented, appellant's lawyer said, "That is not the point of my exception." My colleagues suggest that that rejoinder was insufficient, that the lawyer should have made his exception more explicit. I do not agree because, as stated above, I think that the reasons originally given for the exception were adequately clear.

3. It is obvious, from my colleagues' discussion of the evidence, that they believe appellant was guilty. Accordingly, this seems to be another instance in which they are tacitly applying their unique interpretation of the "harmless error" doctrine. Their position, as explicitly stated in *United States* v. *Liss*, 137 F. (2d) 995, 999 (C. C. A. 2) is that there is a "*modern disposition to assume that an error has been harmless.*"[1] As I have several times heretofore noted in detail, I think that a mistaken assumption.[2]

In *McCandless* v. *United States*, 298 U. S. 342, 347, the Court said that the "harmless error" statute (28 U. S.

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[1] Emphasis added.

[2] See, e. g., *United States* v. *Rubenstein*, 151 F. (2d) 174 (C. C. A. 2); *United States* v. *Liss*, 137 F. (2d) 995, 1001, 1005 (C. C. A. 2); *Keller* v. *Brooklyn Bus Corp.*, 128 F. (2d) 510, 513, 514-515 (C. C. A. 2).

C. A. (391) "does not change the well settled rule that an erroneous ruling which relates to the substantial rights of a party is a ground for reversal unless it *affirmatively*[3] appears from the whole record that it was not prejudicial." In *Bruno* v. *United States*, 308 U. S. 287, 293-294, the Supreme Court (reversing this court) said that this statute was intended merely "to prevent matters concerned with the etiquette of trials and with the formalities and minutiae of procedure from touching the merits of a verdict." In [fol. 49] *Weiler* v. *United States*, 323 U. S. 606, 611, the Court, citing the *Bruno* case, said, "We are not authorized to look at the printed record, resolve conflicting evidence, and reach the conclusion that the error was harmless because we think the defendant was guilty. That would be to substitute our judgment for that of the jury and, under our system of justice, juries alone have been entrusted with that responsibility." All Circuits other than ours in which the question has been considered have acted in accordance with these Supreme Court rulings.[4]

Although usually I concur in the established precedents of this court even when I think them erroneous, I deem it not improper to continue to dissent in cases of this kind until the Supreme Court tells me that I am wrong.

[fol. 50] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 15th day of November one thousand nine hundred and forty-five.

Present: Hon. Learned Hand, Hon. Harrie B. Chase, Hon. Jerome N. Frank, Circuit Judges.

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[3] Emphasis as in the original.

[4] *Lynch* v. *Oregon Lumber Co.*, 108 F. (2d) 283, 285-286 (C. C. A. 9); *Farris* v. *Interstate Circuit*, 116 F. (2d) 409, 412 (C. C. A. 5); *Fort Dodge Hotel Co.* v. *Bartell*, 119 F. (2d) 253, 259 (C. C. A. 8); *Worcester* v. *Par Torpedo Co.*, 127 F. (2d) 945, 947 (C. C. A. 7); *Evansville Container Corp.* v. *McDonald*, 132 F. (2d) 80, 85 (C. C. A. 6); cf. *Little* v. *United States*, 73 F. (2d) 861, 866 (C. C. A. 10).

UNITED STATES, Plaintiff-Appellee,

v.

VERNA MAE BIHN, Defendant-Appellant; GEORGE WESLEY BENNETT, Defendant

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk.

[fol. 51] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. United States v. Verna Mae Bihn. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Nov. 15, 1945. Alexander M. Bell, Clerk.

[fol. 52] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 47] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed February 11, 1946.

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.